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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 600

RED LION BROADCASTING CO., INC.
and
REVEREND JOHN M. NORRIS, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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MEMORANDUM AMICUS CURIAE ON BEHALF OF THE COLUMBIA BROADCASTING SYSTEM, INC.

Pursuant to Rule 42 of the Rules of this Court, consent to the filing of this memorandum *amicus curiae* has been granted by both petitioners and respondents.

QUESTION PRESENTED

Whether the First Amendment and the Communications Act permit the Federal Communications Commission to require that if a television or radio station broadcasts statements reflecting upon the "integrity, character, honesty or like personal qualities" of any person in the "context" of a controversial issue of public importance, it must notify such person and grant him time to reply.

CONSTITUTIONAL PROVISION, STATUTES AND RULES AND REGULATIONS INVOLVED

The constitutional provision, statutes and rules and regulations involved are set forth as Appendix A hereto.

INTEREST OF AMICUS CURIAE

The decision of the Court of Appeals for the District of Columbia Circuit in this case sustains the legality of the Federal Communications Commission's so-called "personal attack" doctrine, as applied to a particular broadcast by a particular station. Under the personal attack doctrine, when a station licensee broadcasts a "personal attack" (a statement reflecting upon the "integrity, character, honesty or like personal qualities" of an individual or group) in the "context" of a controversial issue of public importance, the licensee is required to notify the individual or group attacked and to afford broadcast time for reply.

Pursuant to licenses from the Federal Communications Commission (hereinafter the "Commission"), Columbia Broadcasting System, Inc. (CBS) owns and operates television and/or radio stations in Boston,

Chicago, Los Angeles, New York, Philadelphia, St. Louis and San Francisco. These stations regularly carry programs in which CBS personnel or third persons discuss significant issues of a controversial nature or describe events in the "context" of a controversial issue of public importance. Such programs frequently contain statements which the Commission now considers to be subject to its personal attack requirement. CBS also owns and operates a television network and a radio network which furnish such programs regularly to several hundred broadcast stations.

DISCUSSION

I. This Court Should Hold This Case So That It Can Be Considered Together With a Related Proceeding Now Pending in the Court of Appeals for the Seventh Circuit.

This case involves an application of the Commission's personal attack doctrine to a particular broadcast made in 1964, at a time when this doctrine constituted informal and loosely defined Commission policy, enforceable if at all only in connection with the Commission's power to consider public interest factors when it renews broadcast licenses. After the decision below, the Commission issued a Memorandum Opinion and Order, 32 Fed. Reg. 10303, amending Part 73 of its rules and regulations and adding new rules purporting to define the obligations of any broadcast licensee when a personal attack is broadcast over its facilities. (The new rules appear in Appen. A, *infra,* pp. 2a-4a.) Under Sections 307 (d), 312, 501, 502 and 503(b), of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), 312, 501, 502 and 503(b), violation of the Commission's new rules can subject a broadcast licensee to a Commission cease and desist order, revocation of his license, money forfei-

tures and criminal penalties, as well as denial of license renewal.

The Commission's new personal attack rules were adopted on July 5, 1967, after a rule making proceeding in which CBS and many other broadcast licensees filed comments opposing the new rules. On July 27, 1967, CBS filed a petition to review the new rules (Appendix B hereto) in the Court of Appeals for the Second Circuit. Earlier the same day other broadcasters and an association of radio and television news directors filed a similar petition in the Seventh Circuit. No. 16369, 7th Cir., *Radio Television News Directors Ass'n* v. *United States.* The Second Circuit thereafter transferred the CBS petition and a similar petition filed by NBC to the Seventh Circuit.[1] Certain of the issues raised in the petitions for review are closely related to the issues presented by the petition for certiorari herein.

On October 2, 1967, the Seventh Circuit ordered the briefs for petitioners therein to be filed by November 21, 1967, the brief for the respondents (the United States and the Commission) to be filed by December 21, 1967, and any reply briefs for the petitioners to be filed by January 12, 1968. Argument is anticipated in February 1968. Whether the Commission's new rules are

[1] On August 2, 1967, the Commission, recognizing the deterrent effect of the new personal attack rules upon the broadcast of news programs, adopted a further Memorandum Opinion and Order limiting the new rules to make them generally inapplicable "to bona fide newscasts or on-the-spot coverage of a bona fide news event," but continuing their applicability to interviews, editorial material and documentaries. 32 Fed. Reg. 11531. (The amendments to the new rules appear in Appen. A, infra, p. 4a.) Supplemental petitions to review the Memorandum Opinion and Order of August 2, 1967, were filed by CBS and the others who had sought review of the Commission's original Memorandum Opinion and Order. (The CBS supplemental petition appears as Appendix C hereto.)

sustained or invalidated by the Seventh Circuit, it seems likely that one or more of the parties in that case will petition for review in this Court and that the petition will reach this Court before the end of the present Term.[2]

For reasons stated below CBS agrees that the issues presented by the petition for certiorari are of importance and warrant review. CBS respectfully suggests, however, that this Court hold the present petition so that it can consider this case after the closely related proceeding in the Seventh Circuit has further matured.[3] The Seventh Circuit's decision and opinion on these important issues in the context of general rules governing future licensee behavior should be of great value to this Court. This is particularly so because the decision of the District of Columbia Circuit here involved

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[2] A petition for certiorari is also presently pending in No. 622, this Term, *Brandywine-Main Line Radio, Inc.* v. *Federal Communications Commission*. The threshold issue before this Court in that case seems to be whether a court of appeals has jurisdiction to stay an administrative hearing where one of the issues in the hearing is alleged to be beyond the Commission's power to consider, even though there are other admittedly legitimate issues which can be considered in the hearing. Petitioners there allege that such a stay of the hearing is justified because the Commission has unlawfully included as one issue in the hearing the licensee's compliance with the personal attack doctrine. CBS takes no position on the immediate issue before the Court in *Brandywine*—the power of the court of appeals to stay an administrative hearing. Although the ultimate issues in the *Brandywine* case are related to the issues presented herein and in the pending Seventh Circuit case, those issues seem not to have decided in *Brandywine* by the court of appeals.

[3] See generally *Carter Oil Co.* v. *Welker*, 317 U.S. 592 (1942); *City Co. of New York* v. *Stern*, 312 U.S. 666 (1941); *Michalek* v. *United States Gypsum Co.*, 298 U.S. 639 (1936); Boskey, *Mechanics of the Supreme Court's Certiorari Jurisdiction*, 46 COLUM. L. REV. 255, 267-68 (1946).

an *ad hoc* application of the personal attack doctrine against one licensee; and the decision was rendered by only two judges and without an opinion of the court, Judge Fahy having concurred in the result but not in "all the details" of Judge Tamm's opinion. To permit prior consideration of closely related issues by a full panel of another court of appeals would be in keeping with this Court's policy of soliciting "the valuable assistance of the Courts of Appeals."[4] Adherence to this policy also seems important here because the decision of the court below was issued on June 13, 1967, only one day after this Court announced its decision in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130. Although the *Butts* case is directly relevant to the issues presented herein (see pp. 9-12, *infra*), it is not mentioned in Judge Tamm's opinion nor in Judge Fahy's brief concurrence. This Court may therefore prefer to await an opinion by the Seventh Circuit in which the bearing of the *Butts* case on the Commission's personal attack rules will doubtless be carefully explored.

In addition, while it seems beyond question that the Commission would have reached the same result in this case if it had arisen under the new rules, issues as to lawfulness of an administrative policy can best be viewed in the context of the rules governing adherence to the policy in all future situations. The Commission has stated that the new rules now before the Seventh Circuit "clarify and make more precise the obligations of broadcast licensees where they have aired personal

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[4] *United States* v. *Singer Manufacturing Co.*, 374 U.S. 174, 175 n. 1 (1963). See also *Aaron* v. *Cooper*, 357 U.S. 566 (1958); Rule 20 of the Rules of this Court (certiorari before judgment in the court of appeals).

attacks . . . ." (July 5, 1967, Memorandum Opinion and Order ¶ 3).

Finally, if this Court should grant certiorari herein at this time and decide the present case, it might not be relieved of the need to speak further when and if petitions to review the pending Seventh Circuit case come to this Court. Although the Commission in this case purported to apply a general Commission policy concerning personal attacks, the actual order in the case is simply a single ruling by the Commission in a specific factual context, involving a single broadcast by a single station. The informal personal attack policy thus applied in this ruling has not been enforced by the Commission in any case except in periodic license renewal proceedings through consideration (or threats of consideration) of violations of the policy along with consideration of a licensee's general stewardship of his station. The Seventh Circuit case, on the other hand, involves newly adopted categorical directives which bring to bear the full force of formal agency rules. The rules apply to any broadcasts by any station containing any material falling within the sweeping but imprecise orbit of the rules. The rules are enforceable by criminal and civil sanctions for violation. Thus, the uncertain sanction of future denial of license renewal under the old policy has been buttressed under the new rules by the availability of immediate cease and desist proceedings, monetary forfeiture proceedings, license revocation proceedings, criminal penalties, or some combination of these sanctions.

In view of the differences in timing and severity of the sanctions involved, the chilling effect upon free expression by broadcasters of the Commission's new

rules will be even greater than the inhibitory effect of the Commission's earlier policy involved in this case. Indeed, the rules were adopted to facilitate more vigorous enforcement of the personal attack policy and encourage greater voluntary compliance.[5] Thus, from the point of view of the First Amendment, the Seventh Circuit proceeding may present significant new questions not resolvable in the present case.

II. The Issues Are Important and Warrant Review by This Court.

This case presents critical issues as to the constitutional and statutory legality of a substantial restriction on rights of free expression. Although this Court has recognized that the First Amendment applies to radio and television, for more than twenty years it has not rendered a major opinion considering the rights of broadcast licensees under the First Amendment. This Court has never rendered an opinion squarely considering the extent, if any, of the Commission's constitutional or statutory authority to control program content. As demonstrated below, the decision of the Court of Appeals for the District of Columbia Circuit in this case was erroneous, and conflicts in principle

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[5] The Commission in its July 5, 1967, Memorandum Opinion and Order (¶ 7) noted that "Despite such notification [in policy statements by the Commission] and the Commission's rulings, the procedures specified have not always been followed, even when flagrant personal attacks have occurred in the context of a program dealing with a controversial issue. It is for this reason that we now codify the procedures which licensees are required to follow in personal attack situations."

The ripeness of the *Red Lion* ruling for review has been expressly sustained by the court of appeals below sitting *en banc*. The correctness of this decision seems settled by *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), and by the Commission's rule-making cases relied on therein.

with decisions of this Court vindicating First Amendment rights for other media of expression.

A. The Commission's personal attack doctrine raises serious questions under the First Amendment and Section 326 of the Communications Act.

Until this Court's 1964 decision in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, it was generally assumed that the First Amendment did not prevent a state or the federal government from awarding damages for the publication of libelous or slanderous statements. See, *e.g.*, *Beauharnais* v. *Illinois*, 343 U.S. 250 (1952). However, in *New York Times*, a case involving libel of a public official, this Court determined that a state could not award compensatory or punitive damages for libelous or slanderous statements respecting such an official unless the statements were false and were made with actual malice—that is, with knowledge that they were false or with reckless disregard of the truth.

After *New York Times*, separate opinions by members of this Court and various lower court decisions suggested that the *New York Times* rule might apply not merely to statements concerning public officials but also to statements relating to matters of public importance.[6] Late last Term the scope of that rule was

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[6] See *Time, Inc.* v. *Hill*, 385 U.S. 374, 388, 415 (1967) (majority and dissenting opinions); *Rosenblatt* v. *Baer*, 383 U.S. 75, 91 (1966); *Walker* v. *Courier-Journal and Louisville Times Co.*, 246 F. Supp. 231, 234 (W.D. Ky. 1965), *rev'd on other grounds*, 368 F. 2d 189 (6th Cir. 1966); *Gilberg* v. *Goffi*, 21 App. Div. 2d 519, 525-28, 251 N.Y. Supp. 2d 823, 830-32 (1964), *aff'd without opinion*, 15 N.Y. 2d 1023, 260 N.Y. Supp. 2d 29, 207 N.E. 2d 620 (1965); *Pauling* v. *News Syndicate Co.*, 335 F. 2d 659, 671 (2d Cir. 1964) (dictum), *cert. denied*, 379 U.S. 968 (1965). See also *New York Times Co.* v. *Sullivan*, 376 U.S., at 295-96 (Black and Douglas, JJ., concurring).

clarified in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130 (1967). While there was no opinion speaking for a majority of the Court, there was unanimous agreement among the Justices that the *New York Times* rule, or a variant thereof, applies to "public figures"—those "involved in issues in which the public has a justifiable and important interest." *Id.*, at 134. See also *id.*, at 154-55. As a result it is now clear that it is unconstitutional for a state or the federal government to impose punishment or award damages for false and defamatory but non-malicious statements in publications concerning persons involved in issues of public importance.[7]

The Commission's personal attack doctrine, like the tort rules before the Court in the *New York Times* and *Butts* cases, imposes a governmental sanction against statements reflecting adversely upon the character of individuals or groups made in the context of a discussion of an issue of public importance. The Commission's doctrine merely creates a somewhat different remedy. Instead of imposing civil damage liability, it compels a broadcaster to carry the reply of the per-

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[7] The opinion of Mr. Justice Harlan, in which Justices Clark, Stewart and Fortas joined, would have allowed recovery under such circumstances "for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U.S., at 155. The relevant portion of the opinion of Mr. Chief Justice Warren, in which Justices Brennan and White joined, adhered to the *New York Times* standard for "public figures." 388 U.S., at 162-63. Justices Black and Douglas reiterated their position that even false statements made with actual malice are protected by the First Amendment. 388 U.S., at 170-71. Thus, a majority of the Court holds to a principle at least as protective of publication as that stated in the text.

son "attacked". In certain respects, this right of reply remedy goes much further than the tort rules before the Court in *New York Times* and *Butts*. Its sanction is to be imposed even if the statement involved is entirely true, or, if the statement is false, even if it is made without malice. This wider sweep plainly invests the Commission's doctrine with a wider inhibitory or chilling effect, and if damages were involved, it would be clearly invalid. One would hardly suppose that the courts would sustain as constitutional a statute authorizing damages for defamatory statements even when truthful and made in good faith.

Although the benefits conferred and the burdens imposed by the right of reply requirement are somewhat different from those imposed by ordinary libel and slander remedies, this difference is not constitutionally significant. Indeed, in some circumstances both the benefits and the burdens of a right of reply may be greater than would be true of damages. The right of reply sanction is in essence the equitable remedy of mandatory injunction, which is generally regarded as a drastic and unusual remedy, available only when mere damages are inadequate.

The monetary and other burdens imposed by the right of reply, no less than the traditional damage remedy for libel, lead to the self-censorship respecting matters of importance to the public that the First Amendment denies the government the power to impose. The burdens certainly are at least as onerous as such indirect restrictions on First Amendment rights as a requirement that a bookseller examine the contents of his shop,[8] a requirement that a magazine pub-

[8] *Smith* v. *California*, 361 U.S. 147 (1959).

lisher investigate his advertisers,[9] a requirement that names and addresses of sponsors be printed on handbills,[10] a requirement that organizations supply membership lists,[11] and a requirement that individuals disclose organizational memberships[12]—all of which have been held unconstitutional on the ground that they discouraged or chilled constitutionally protected rights of speech, press or association.

From the above discussion it is plain under *New York Times* and related cases that a right of reply in printed media raises very serious questions under the First Amendment.[13] The Commission's argument for the constitutionality of its right of reply sanction[14] must rest on the contention that, aside from the question whether or not the right of reply could constitutionally be required in printed media, broadcasting stands upon a different footing. But the right of reply sanction plainly interferes more with editorial preparation and imposes greater monetary burdens in broad-

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[9] *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 492-93 (1962) (opinion of Harlan, J.).

[10] *Talley* v. *California*, 362 U.S. 60 (1960).

[11] *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U.S. 293 (1961); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

[12] *Shelton* v. *Tucker*, 364 U.S. 479 (1960).

[13] In the United States there is only one general right of reply statute (Nev. Rev. Stat. § 200.570 (1963)), and it is not applicable to broadcasters. So far as we know no United States case has considered the constitutionality of a reply statute under the First Amendment.

[14] See July 5, 1967, Memorandum Opinion and Order ¶ 5.

casting than in newspaper publishing. A newspaper has few practical limitations on the number of pages and columns of print it can publish, while the number of programs that can be broadcast is sharply limited by the element of time. Thus threatened with severe disruption of normal programming through forced provision of "reply" time, many broadcasters will decide to delete any material even arguably subject to the vague contours of the personal attack doctrine.[15]

The Commission initially suggested that its new rules "do not prescribe in any way the presentation by a licensee of personal attacks."[16] But within a month the Commission was forced to concede that presentation of personal attack material in "bona fide newscasts" and "on-the-spot coverage of bona fide news events" would be deterred unless the newly issued rules were amended to make them inapplicable in that area.[17] The Commission's reasoning as to the deterrent effect of these aspects of the rules necessarily extends not merely to "bona fide newscasts" and "on-the-spot coverage of bona fide news events," but also to "news documentaries" and "news interviews", and other related programs to which the amended rules continue specifically to apply.

The inhibitory effect of a right of reply sanction in broadcasting has been authoritatively recognized in

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[15] Compare *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525 (1959) "quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks evenly faintly objectionable would be excluded out of an excess of caution." (*id.*, at 530).

[16] July 5, 1967, Memorandum Opinion and Order ¶ 5.

[17] August 2, 1967, Memorandum Opinion and Order ¶ 2.

other quarters. This very concern led Congress to amend Section 315 of the Communications Act, as amended, 47 U.S.C. § 315, to make the provisions for equal time for political candidates inapplicable not only to newscasts and on-the-spot coverage but to news-related programs of the type still covered by the Commission's personal attack rules.[18] France and Germany have had extensive experience with right of reply statutes.[19] Although unfettered by First Amendment restraints, the laws of both countries exempt radio and television from right of reply requirements.[20]

Yet the Commission argues that its right of reply sanction does not infringe the First Amendment because the broadcast medium is different from the medium of print. The argument runs that the num-

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[18] Senator Hartke, among others, commented that in his home state broadcasters had begun to black out political coverage in mere anticipation that the *Lar Daly* decision (*infra*, pp. 21-22) would be handed down. 105 Cong. Rec. 14447 (1959).

[19] See generally Note, *The Right of Reply: An Alternative to an Action for Libel*, 34 VA. L. REV. 867 (1948); CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947), pp. 187-190.

[20] See CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947), pp. 187-88:

> "The radio is obviously unsuited to the simple machinery of reply provided by the French and German statutes [obligating the press to print replies to personal attacks]. It might be entirely natural for a commentator to mention two or three prominent persons, e.g., Mr. Ickes, Mr. Pauley, and Mr. Truman, in a single broadcast. If each of those three men should possess the legal right to reply, they would take over practically all the time of this commentator for his next broadcast. The whole character of news comments might easily be changed by such a legal requirement. Consequently, French and German courts have held their statutes inapplicable to the radio."

ber of available broadcast channels is limited while the number of newspapers is not, that the government must necessarily license one medium but not the other, and that the best way to assure full discussion of all sides of an issue is to require that each broadcaster allow time for reply to personal attacks broadcast in the "context" of an issue of public importance. The factual assumption is dubious. In fact, there are more radio and television stations broadcasting daily than there are daily newspapers in the United States.[21] However, even assuming the correctness of the Commission's factual assumption, its conclusions of lack of First Amendment protection does not follow.

As the opinion of Judge Tamm below conceded, and as this Court has stated, radio and television are protected by the First Amendment. *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (dictum); *Superior Films, Inc.* v. *Department of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring). See also *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190, 226-27 (1943). The First Amendment does not rest on the theory that freedom of speech is best served if each source will present a balanced view of any controversial issue, but on the theory that a multiplicity of sources, whether individually balanced or unbalanced, will enable the public to hear all sides. While it may be that some governmental restrictions can be constitutionally applied to a broadcaster but not to a newspaper pub-

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[21] There are approximately three times as many commercial broadcasters as there are daily newspapers. See U.S. BUREAU OF CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1967 (88th ed.), pp. 515, 519.

lisher, the right of reply sanction is not in that class.[22] Under its personal attack doctrine the Commission asserts the power to dictate the content of particular programs. It compels a station to broadcast a program consisting of a statement by a particular person on a particular subject whether or not the licensee chooses to carry the program. The circumstances in which a reply is to be carried and the licensee's discretion, if any, to determine the content of the reply are to be resolved by the Commission. If the decisions that broadcasting is protected by the First Amendment are to have any meaning at all, they must mean that the Commission has no power to compel a station to carry a particular

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[22] The cases relied on by the opinion below, while sustaining Commission action affecting programming, do not support the Commission's power to dictate the content of specific programs. Three of the cases sustain Commission power at the time of license application or amendment to consider overall station programming or to consider efforts of the applicant to ascertain community program needs and desires. *Henry* v. *Federal Communications Commission*, 112 U.S. App. D.C. 257, 302 F. 2d 191, *cert. denied*, 371 U.S. 821 (1962); *Johnston Broadcasting Co.* v. *Federal Communications Commission*, 85 U.S. App. D.C. 40, 175 F. 2d 351 (1949); *Bay State Beacon, Inc.* v. *Federal Communications Commission*, 84 U.S. App. D.C. 216, 171 F. 2d 826 (1948). Two of the cases sustain Commission power to prohibit licensees from entering into contracts or commitments restricting the further exercise of programming judgment. *National Broadcasting Co., Inc.* v. *United States*, 319 U.S. 190 (1943); *Simmons* v. *Federal Communications Commission*, 83 U.S. App. D.C. 262, 169 F. 2d 670, *cert. denied*, 335 U.S. 846 (1948). Two other cases sustain Commission power to prevent a common carrier radio licensee from extending a signal of one broadcast station to a distant market where it would duplicate the signal of a local station in that same market. *Idaho Microwave, Inc.* v. *Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359, *cert. denied*, 375 U.S. 951 (1963).

program.[23] The Commission itself has generally recognized this limitation,[24] though the personal attack doctrine represents a signal departure from this policy of restraint.

In short, as Professor Chafee has pointed out:

> ". . . the First Amendment prevents the FCC from engaging in two kinds of activity. The first of these embraces what Congress had in mind when it forbade the Commission to exercise 'censorship' over radio communications. This means, I feel sure, the sort of censorship which went on in the seventeenth century in England—*the deletion of specific items and dictation as to what should go into particular programs. Such supervision of details is in no way part of the Commission's job of allocating wave lengths.*" [Emphasis supplied and footnotes omitted.][25]

From a constitutional standpoint, the Commission's personal attack doctrine is significantly different from the Commission's general fairness requirement, which —while some see in it other constitutional infirmities— does not compel licensees to broadcast particular pro-

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[23] If the Commission's personal attack doctrine were held invalid, it would not mean that a person maliciously and falsely defamed would be without remedy. As in the newspaper situation, normal libel remedies will apply in such cases under the *New York Times* and *Butts* rules.

[24] Office of Network Study, Second Interim Report, Television Network Program Procurement, Part I (1962), p. 34, reprinted in H.R. Rep. No. 281, 88th Cong., 1st Sess. (1963); *id.*, Part II (1965), p. 777; Report and Statement of Policy Re: Commission *En Banc* Programming Inquiry, 25 Fed. Reg. 7291 (1960).

[25] CHAFEE, GOVERNMENT AND MASS COMMUNICATIONS (1947), p. 641.

grams or to offer time to particular spokesmen, but imposes only a general requirement of licensee fairness and objectivity reviewable together with other elements of stewardship of the station at the time of license renewal. Thus, any constitutional questions presented by the Commission's general fairness requirement need not be reached in considering the narrow constitutional issues raised by the personal attack doctrine.

Section 315 of the Communications Act, requiring equal time for political candidates, deals with the unique problems presented by the use of broadcast facilities for political campaigns. Arguably, Congress may have power to place some restrictions upon the direct involvement of federally licensed broadcast stations in political campaigns, including a requirement that opposing candidates be treated in an even-handed manner. Cf. *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947). Moreover, the candidates' rights to reply to one another are carefully limited by Section 315, and do not extend either to statements by non-candidates or to statements by candidates on news-related programs—two areas in which the personal attack doctrine applies.

For the foregoing reasons it is believed that the Commission's rules raise the gravest of questions under the First Amendment. Whether or not Congress would have constitutional power to enact the personal attack doctrine, the serious nature of the constitutional questions involved suggests that the general language of the Communications Act should not be construed to grant such an implied and dubious power to the Commission. *Eastern Railroad Presidents Conference* v.

Noerr Motor Freight, Inc., 365 U.S. 127 (1961); *Greene* v. *McElroy*, 360 U.S. 474 (1959).

Although we believe and have urged that Congress itself could not validly enact the personal attack doctrine, the invalidity of the Commission's rules may be established on the basis of the Communications Act alone. Included in Section 326 of the Act, 47 U.S.C. § 326 (Appen. A *infra*, p. 2a), is an explicit denial to the Commission of power to censor broadcasts; in addition there is a prohibition against any regulation "which shall interfere with the right of free speech by means of radio communication." This bar against program supervision by the Commission surely was intended at a minimum to incorporate the free speech provisions of the First Amendment.[26] In a recent case where the United States has appealed from a decision where the Commission has claimed for itself a watchdog role as to a licensee's future news programming objectivity, the brief for the United States points out:

> "... a continual process of demanding explanations as to why particular news items or programs were or were not shown would come dangerously close to the kind of program censorship which is barred by the First Amendment and Section 326 of the Communications Act. The Commission has not been given 'supervisory control of programs, business or policy' (*FCC* v. *Sanders Bros.*, 309 U.S. at 475)."[27]

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[26] See *Farmers Union* v. *WDAY, Inc.*, 360 U.S. 525, 529-30 (1959); CHAFEE GOVERNMENT AND MASS COMMUNICATIONS (1947), p. 641.

[27] Brief for appellant United States of America in No. 21147, D.C. Cir., *United States of America* v. *Federal Communications Commission*, p. 168.

B. Apart from Section 326, there is a substantial question whether the Commission's personal attack doctrine is authorized by the Communications Act.

Section 315 of the Communications Act, relating to equal time for political candidates, is the only section of the Act which restricts, or authorizes the Commission to restrict, licensee discretion in public affairs programming. Historically, Congress has consistently rejected attempts further to limit the discretion of broadcasters in that programming area.[28] For example, in 1927, during debates on the Radio Act, the Senate took out a provision which would have required that equal time be afforded to proponents of different viewpoints in public affairs discussions. Senator Dill warned that unless the equal time provisions were stricken with regard to the discussion of public questions ". . . a radio station . . . would have to give all their time to that kind of discussion, or no public question could be discussed."[29]

The personal attack doctrine involves precisely the type of governmental interference with broadcaster

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[28] See H.R. 3039, 75th Cong., 1st Sess. (1937) (broadcasters to set aside regular and definite periods for uncensored discussion of public questions and to afford at least one exponent of each opposing viewpoint equivalent facilities); S. 635, 76th Cong., 1st Sess. (1939) (similar to H.R. 3039, 1937); S. 814, 78th Cong., 1st Sess. (1943) (equal time for reply required when public officers discuss public questions); S. 1333 and H.R. 3595, 80th Cong., 1st Sess. (1947) (equal opportunities required for the presentation of different views whenever one viewpoint has been presented); H.R. 7612, 88th Cong., 1st Sess. (1963) (opportunity for response required when an individual subjected to ridicule by a candidate utilizing equal time pursuant to Section 315); H.R. 7072, 88th Cong., 1st Sess. (1963) (equal time to be offered opponent when station editorializes favoring one candidate or opposing his opponent); H.R. 5415, 89th Cong., 1st Sess. (1965) (similar to H.R. 7612, 1963).

[29] 67 Cong. Rec. 12504 (1926).

freedom to select public affairs programs that Congress has refused to approve. The Commission suggests, however, that the personal attack principle is a part of its fairness doctrine, requiring licensees who present one side of a public issue to present other points of view. It also suggests that Congress approved the personal attack principle when it referred to the Commission's fairness doctrine in the 1959 amendments to Section 315 of the Communications Act.[30] The 1959 amendments to Section 315, creating an equal time obligation exclusively for political candidates, did include language recognizing that general fairness requirements would still apply to news-related programs being exempted from the explicit equal time obligations. But this language did not express or imply approval of any personal attack doctrine. There was no suggestion in the hearings, committee reports or debates that anything resembling the personal attack requirement was inherent in the Act or the Commission's fairness doctrine. Indeed, it was not until 1962 that the Commission first announced the personal attack requirement,[31] and it was not until the decision in the

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[30] July 5, 1967, Memorandum Opinion and Order ¶ 4.

[31] See *Clayton W. Mapoles*, 23 Pike & Fischer, R.R. 586 (1962); *Billings Broadcasting Co.*, 23 Pike & Fischer, R.R. 951 (1962). It is true that in the Commission's 1949 Report on Editorializing, 13 F.C.C. 1246, 1251-52, the Commission included language to the effect that personal involvement in a controversy might be a factor to be considered along with other factors in determining whether to honor specific requests for discussion time on matters of public interest. But this language plainly recognized that station licensees had discretion to determine the circumstances in which a reply to an attack would be appropriate. The later *Mapoles and Billings* rulings themselves suggest only that, in the particular circumstances of each, failure to offer time for reply was an abuse of licensee discretion.

present case and the subsequent new rules that the principle was fully articulated.

Furthermore, the personal attack requirement is directly contrary to the spirit of the Section 315 amendments as conceived by Congress in 1959. The 1959 amendments had their genesis with a Commission ruling in the *Lar Daly* case [32] that the appearance of a candidate on a station's news or news-related programs constituted a use of broadcasting facilities, thus subjecting the station to the provisions of Section 315 and compelling it to afford equal time to a minor candidate. The amendments relieved broadcasters from what Congress believed to be an unduly restrictive, categorical requirement imposed by the *Lar Daly* ruling. The equal time provisions of Section 315 were made inapplicable to news and news-related programs, subject only to general requirements of fairness as they were then understood. To interpret these liberalizing amendments as sanctioning new restrictions on exercises of journalistic judgment by broadcasters is untenable.

CONCLUSION

The issues presented by this case are of substantial public importance and warrant review by this Court. For the reasons stated above, however, we respectfully suggest that this Court hold the petition for certiorari until the decision of the related case now pending in the United States Court of Appeals for the Seventh Circuit, so that the present petition can be considered in the light of the decision in that case

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[32] *In the Matter of Petition of Columbia Broadcasting System, Inc.*, 26 F.C.C. 715 (1959).

and along with any petitions for certiorari which may be filed therein.

Respectfully submitted,

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